Its statutory purposes, existing prohibitions on discrimination and the evidence of discrimination related to FCC licensing all afford the FCC the basis on which to adopt prohibitions on discrimination in connection with licensing transactions and establish means by which to investigate and enforce those prohibitions. While the FCC likely could not adopt regulations providing for private enforcement of a prohibition on conduct with unjustified discriminatory effects, as opposed to intentional discrimination, see *Alexander v. Sandoval*, 532 U.S. 275 (2001), current precedent would allow the FCC to adopt such "effects standard" regulations in furtherance of its statutory mandate that it could enforce. *Id.*

The interest in preventing discrimination properly could be served by measures requiring existing or prospective licensees to qualify by providing data or documentation that would allow assessment whether their operations suggested the elements of a potential discrimination claim. Where such a suggestion exists, review, modification and other corrective measures could be required. This approach has long been utilized in connection with Executive Order 11246, 30 FR 12319, 12935, 3 CFR, 1964-1965 Comp., p.339 (1965), enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) with respect to federal contractors and subcontractors. Implementation of Executive Order 11246 requires a contractor, as a condition of having a federal contract, to engage in a self-analysis for the purpose of discovering any barriers to equal employment opportunity. Similar measures might be designed to permit assessment of licensees and applicants as a qualification for FCC licenses.

2. Establishing prohibitions against discrimination in broadcast and telecommunications advertising

The specific evidence of discrimination in broadcast advertising and its effects on the ability of minorities to enter, succeed and grow in broadcasting suggests that efforts are required by the FCC to eliminate these practices and ensure the operation of an industry free of the effects of discrimination. Discrimination in advertising, as a contract, is unlawful, as described above. However, given the critical importance of advertising revenue to the broadcast industry and the apparent pervasiveness of these practices, prohibitions focused upon and specific to advertising practices should be adopted and investigation and enforcement mechanisms established. These measures could be either independent or specific provisions of broader prohibitions on discriminatory transactions related to broadcasting or telecommunications. The investigation and enforcement mechanisms could include the certification, reporting and corrective measures identified above.

3. Reestablishing prohibitions against discrimination in employment among licensees and establishing effective investigation and enforcement mechanisms

The fact that racial discrimination in employment related to interstate commerce is unlawful as a matter of federal law, together with the evidence of discrimination in broadcasting employment, the ineffectiveness of past FCC enforcement, and very low

participation of minorities in broadcasting and telecommunications ownership, all suggest that FCC prohibitions on employment discrimination should be reinstated and investigation and enforcement mechanisms established. Existing law imposes an "effects standard" in employment discrimination that could be mirrored in FCC prohibitions, and investigation and enforcement mechanisms could appropriately include "certifications" of applicants and licensees that they have not engaged in discrimination and disclosure of information to assess those representations and, where indicated, require corrective actions to ensure that applicant and licensee policies and decisionmaking are not discriminatory.

Of course, the Court of Appeals for the District of Columbia Circuit has addressed the question of the FCC's prior Equal Employment Opportunity (EEO) policies twice in the past, invalidating them on each occasion. Yet examination of each of those decisions demonstrates that they do not stand as barriers to a new set of EEO regulations by the FCC.

In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, rehearing denied, 154 F.3d 487, rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998), the Court of Appeals invalidated the FCC's equal employment opportunity regulations on the basis that they "encourage[d] racial preferences in hiring" and were thus subject to strict scrutiny. *Id.*, 154 F.3d at 492. The court held that the regulations failed to satisfy that standard in concluding that the FCC's stated interest in program diversity was not a compelling interest, *id.*, at 493, and that the measures were not narrowly tailored. *Id.*, 141 F.3d at 344. In *MD/DC/DE Broadcasters v. FCC*, 236 F.3d 13, rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied, *Minority Media & Telecomms. Council v. MD/DC/DE Broadcasters Assn.*, 534 U.S. 1113 (2002), the Court of Appeals invalidated the FCC's equal employment opportunity rule requiring broad outreach and recruiting, promulgated subsequent to *Lutheran Church*. The Court subjected the outreach rule to strict scrutiny, holding that with outreach to minorities and women "non-minorities are less likely to receive notification of job openings solely because of their race." *Id.*, 236 F.3d at 21. The court did not decide whether preventing discrimination was a compelling interest, *id.*, but found that the rule was not narrowly tailored because it pressured broadcasters to recruit minorities "without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future" and that information on the race and gender of applicants is "not probative on the question of a licensee's efforts to achieve 'broad outreach.'" *Id.*, 22.

These decisions, although currently binding on the FCC, do not represent barriers to new EEO rules and are of questionable validity. *Lutheran Church* was premised upon speculation at the time that the Supreme Court would reject diversity as a compelling interest, based on concerns in Justice O'Connor's dissent in *Metro Broadcasting*. As the discussion of the diversity interest in this report illustrates, those concerns were given very different treatment in Justice O'Connor's opinion for the majority in *Grutter*, upholding diversity as a compelling interest. In any event, the ruling was premised on the fact that the court held the only interest on which the FCC premised the rules was the

broadcast diversity interest, *Lutheran Church*, 154 F.3d at 493, and thus says nothing regarding the interest in preventing discrimination.

As noted, *MD/DC/DE Broadcasters*, although expressing some doubt, the panel did not rule on the question whether preventing discrimination in broadcasting employment was a compelling interest. *MD/DC/DE Broadcasters*, 236 F.3d at 21. Further, the dispositive narrow tailoring ruling requiring a "predicate finding" that a particular entity has discriminated or is likely to discriminate in the future, *id.*, at 22, is contradicted by Supreme Court decisions and those of other courts of appeals. First, as discussed in Section II. B. 2. & n. 3, above, there is no basis on which to conclude that the mere collection and assessment of racial data to determine whether disparities exist even implicates strict scrutiny. See *Bush*, 517 U.S. at 993 (O'Connor, J. concurring). Indeed, it would be impossible for a government entity to ensure that it was not a passive participant in a discriminatory market if were prohibited from collecting and examining relevant data to determine whether disparities exist between utilization and availability. Second, even if strict scrutiny were to apply to mere data collection and analysis, there is evidence in the Section 257 Studies and elsewhere suggesting that discrimination is present or likely in the broadcasting industry providing a strong basis in evidence for collection and analysis of data. *Id.*, at 994.

Third, the insistence on a predicate *finding* of discrimination by particular broadcasters is contradicted by consistent Supreme Court rulings that no finding of actual discrimination is necessary for race-conscious action and that statistical disparities alone are a sufficient basis for consideration of race. See *Croson*, 488 U.S. at 500; *Johnson*, 480 U.S. at 630; *id.*, at 650, 652 (O'Connor, J., concurring in judgment); *Wygant*, 476 U.S., at 277; *id.*, at 290 (O'Connor, J., concurring in part and concurring in judgment); *Concrete Works*, 321 F.3d at 971 quoting *Croson*, 488 U.S. at 500. ("Strong evidence is that 'approaching a prima facie case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination."). Indeed, the proposition that consideration of race can only occur where a particular entity has been found to have discriminated, adopted by a district court in the contracting context, was explicitly overruled by the Tenth Circuit in *Concrete Works*, 321 F.3d at 971-72 ("The Supreme Court has clearly stated that the inference of discriminatory exclusion can arise from statistical disparities. Accordingly, we conclude that Denver can meet its burden through the introduction of statistical and anecdotal evidence alone. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the court erred.") (citation omitted).

Moreover, the suggestion in MD/DC/DE Broadcasters that the "identified discrimination" to which the compelling remedial interest applies assumes a finding of actual discrimination, see *id.*, at 21, also is contradicted, not only by the Supreme Court holdings expressly rejecting the need for such findings, but by the consistent assumption of the Court and the express views of five members of the Court that there is a compelling interest in taking race-conscious action to *prevent* a violation of law, including laws prohibiting actions with discriminatory effects. See *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion); *id.*, at 990-92 (O'Connor, J., concurring); *cf*

United Steel Workers v. Weber, 443 U.S. at 208. Further, the view that expanded outreach and recruitment to include minorities, or similar efforts to reduce the adverse impact of tests, represent a cognizable injury to non-minorities has been rejected by other Courts of Appeals. See, e.g., *Raso v. Lago*, 135 F.3d 11, 16-17 (1st Cir. 1998); *Hayden v. County of Nassau*, 180 F.3d 42, 51-53 (2d Cir. 1999); *Byers v. City of Albuquerque*, 150 F.3d 1271 (10th Cir. 1998); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997). Finally, the suggestion in *MD/DC/DE Broadcasters* that white men have a constitutionally protected interest in maintaining advantages that arise from practices that have the effect of excluding others from opportunities, 236 F.3d at 20-21, is belied by the Supreme Court's narrow tailoring precedent, holding that the interests of third parties extend only to not being foreclosed from individualized consideration. *Grutter*, 539 U.S. at 341, quoting *Bakke*, 438 U.S. at 318; *U.S. v. Paradise*, 480 U.S. at 171; *United Steel Workers v. Weber*, 443 U.S. at 208.

In any event, the FCC has data regarding the participation of minorities in broadcasting employment over decades that could now be analyzed. To the extent that that data indicates an underrepresentation of minority employment in the industry generally, it would provide a strong basis in evidence for the collection of additional and current data and the analysis of that data to determine whether efforts were required of particular broadcasters in order to eliminate conditions that suggest the elements of discrimination claims.

B. Race-neutral Measures

Race-neutral measures to address the underutilization of minorities in broadcasting and telecommunications are available to the FCC without constitutional restraint. Indeed, the availability and effectiveness of race neutral measures are to be considered in connection with the narrow tailoring function. To the extent they can contribute to the goal of increasing minority participation in FCC licensing, they should be utilized.

However, the evidence related to FCC past policies and measures also makes clear that race-neutral means alone are ineffective in addressing the underutilization of minorities. Indeed, the evidence suggests that even past race-conscious minority ownership measures, in their design or application, produced only low levels of minority applications, disproportionately disqualified minority applicants, and provided licenses at levels below or equal to the low levels of qualification, and then often only as nominal participants in majority-controlled applications. Accordingly, experience demonstrates that reliance solely on such race-neutral devices would be inadequate to overcome the very low rates of minority participation in licensing applications and license ownership.

Section 257 of the Telecommunications Act and Section 309(j) of the Communications Act of 1934 both mandate that the FCC further opportunities for small businesses in telecommunications and the allocation of spectrum-based services. Measures focused on providing opportunities to small businesses and to those who have experienced social and economic disadvantage other than on the basis of race should be included and coupled with race-specific measures to serve other federal policy interests in broadcasting and to

address minority underutilization to the extent feasible. One such model is the Disadvantaged Business Enterprise program of the Department of Transportation.

Several types of race-neutral measures are suggested by the record here, and are briefly discussed.

1. Access to Licensing

Race-neutral measures to address the underutilization of minorities in broadcasting and telecommunications include outreach, technical assistance, access to information and to financing, and programs directed to other barriers. For example, the results of the Auction Utilization Study clearly indicate that the availability of installment plans to small businesses was the critical element permitting minority applicants to participate in and secure licenses in those auctions. In fact, the evidence suggests that in the absence of installment plans, minorities would have had almost no success in obtaining licenses. Accordingly, installment plans are an example of a critically important race-neutral component that, in combination with race-conscious measures, could be expected to facilitate minority ownership opportunities.

In addition, some interests that are not clearly compelling for purposes of strict scrutiny, but arise from federal communications policy and its purposes and regulatory aims suggest particular types of race-neutral measures which may contribute to the effort to address minority underutilization.

2. Promoting Competition

As discussed above, the FCC clearly has an interest and mission in promoting competition. In furtherance of that purpose, the FCC could design and implement educational, outreach, and exposure programs to encourage and stimulate entry and participation in broadcasting targeted to those segments of the population that are not now participating in spectrum-based and telecommunications, and establish race-neutral criteria to promote competition, including small businesses, new market entrants, and underserved communities (defined by geography, technology, ownership, etc.) for which credit is afforded in qualifying for and acquiring licenses through the FCC and tax credits are made available in the secondary market, and for which incentives for financing and capital are made available. Given the underutilization of minorities, the definition and design of these race-neutral criteria could serve to promote minority ownership.

3. Promoting Universal Service

The FCC also clearly has an interest and mission in promoting universal service, as noted in the discussion above. In furtherance of that mission, the FCC could establish qualifying and licensing criteria to promote universal service, including measures that will reach communities ill-equipped to gain access to, and which are underserved in broadcasting and by advances in telecommunications and information technologies, for which credit would be afforded to applicants in qualifying and or acquiring licenses

through the FCC and through tax credits in the secondary market, and for which assistance in access to financing and capital would be made available. In addition, the FCC could implement educational, outreach, and exposure programs to encourage and stimulate participation in advances in telecommunications and information technologies, and provide or stimulate means of making technology and service available to underserved and under-equipped communities that would enhance the opportunities of prospective licensees to serve these communities. As with measures to promote competition, the definition and design of these race-neutral criteria could serve to stimulate minority interest and ownership.

C. Race-conscious Measures

As the discussion of compelling interests above indicates, there are two bases on which the FCC may premise race-conscious measures to promote minority ownership. These are measures to remedy and prevent discrimination in broadcast licensing, by the FCC and by other industry participants, and to further the national interest in broadcast diversity. The remedial interest applies to both broadcasting and telecommunications, while broadcast diversity, by definition, applies only in the field of broadcasting. The types of measures available in service of each of these interests are discussed in turn.

1. Remedial Interest

Assessing the availability of race conscious measures to serve this interest and, to some extent, to identify the types of measures that are appropriate requires an assessment of evidence suggesting a need for remedial measures. *Adarand*, 515 U.S. at 236; *Croson*, 488 U.S. at 510. Policies by which government agencies take race into account in decision-making do not require a finding or admission of past or present discrimination. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. at 630; *id.*, at 650, 652 (O'Connor, J., concurring in judgment); see *Wygant*, 476 U.S., at 290 (O'Connor, J., concurring in part and concurring in judgment). Instead, a firm or strong basis in evidence that remedial action is necessary is presented by evidence suggesting the equivalent of a prima facie case of discrimination sufficient under Title VII of the Civil Rights Act of 1964. Such a showing commonly is made by reference to a statistical comparison of those members of a particular race employed or contracted by the entity with the members of that race available for that employment or contracting in the market. *Croson*, 488 U.S. at 500; *Johnson*, 480 U.S. at 631-32; *id.*, at 651-52 (O'Connor, J., concurring in judgment); *Wygant*, 476 U.S., at 277. The showing can also be established by other evidence suggesting a policy or practice of discrimination or a combination of statistical and other evidence. *Croson*, 488 U.S. at 509; *Johnson*, 480 U.S. at 631-32.

Evidence regarding the FCC and the broadcast and telecommunications industries contains some statistical and a variety of other evidence suggesting a pattern or practice of discrimination. With regard to the statistical evidence, as noted, this commonly involves a comparison of the number or percentage of members of a race to whom the entity has extended the benefit of employment or contracts with the number or percentage

of members of that race that are available for that employment or contracting in the market. The record here does not present the basis for such a simple comparison.

As noted in the discussion of the limitations on several of the Section 257 Studies, uniform and consistent data reflecting historical levels of minority participation in FCC licensing is not readily available and has not been produced. Indeed, for reasons that are not made clear in the Reports, data regarding FCC licenses by race at the time the Reports were prepared was not included. In addition, as several of the Section 257 Studies pointed out, given the fact that broadcasting and telecommunications are unique to FCC licensing, there is no broader market or industry in which these services are provided that would readily serve as a measure of the availability of minorities to participate as license owners. The response of those Section 257 Studies that addressed the issue was not to attempt to determine or develop measures of the availability of minorities for participation in licensing for comparison to the rate at which minorities have received licenses. Thus, although general population percentages were recited, again for reasons not made clear in the Reports, no data on the availability of minorities in the market was presented. In short, none of the Section 257 Studies undertook a traditional disparity study with respect to FCC licensing.

Instead, the Studies measured minority licensing during particular periods for which data was available—for the most part during periods when minority ownership measures were in place—and compared the data on licensing only to that pool of minorities that successfully qualified for licensing, or measured licensing against the pool of minorities who actually submitted applications. Neither of these measures appropriately assesses availability and both approaches fail to account for discrimination and its effects that deter or discourage minority applications, depress the rate at which minorities obtain exposure or experience that would lead to applications, limit the ability of minorities to secure the financing needed for application or qualification, or limit the rate at which minorities otherwise might qualify for participation in licensing. In short, these measures do not account for the variety of ways in which discrimination prevents, deters or disadvantages minority applications and licensing.

The Section 257 Studies suggest that insufficient FCC funding was responsible for these inadequacies in determining availability, and recommend that additional studies be undertaken to determine more fully measures of the availability of minorities. These recommendations are appropriate and further studies can certainly be done to more fully investigate and quantify the effects of discrimination on the availability and utilization of minorities in licensing. However, these limitations of the Studies need not limit the ability of the FCC to take immediate action to address the apparent underutilization of minorities in licensing.

Existing data appears to provide a sufficient basis on which to take race into account in FCC licensing decisions consistent with established precedent. First, while the measure of availability for purposes of identifying statistical disparities is based on the representation of those members of a racial group in the market with the appropriate qualifications, it is not clear that any particular qualifications are required for FCC

licensing. With the exceptions of having available financing and the advantage of prior broadcast experience, there do not appear to be fixed or defined educational degrees, employment, experience, certification, test scores or other commonly accepted means of measuring qualifications in the market for the acquisition of FCC licenses. And access to capital and broadcasting experience are not race-neutral criteria for these purposes, as there is evidence of discrimination against minorities in licensing with respect to each of these.

Second, while assumptions should not be made that members of particular races or other groups will gravitate to various occupations in mathematical precision to their representation in the population, *Croson*, 488 U.S. at 503, 507-08, quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part), the appropriate measure of availability for positions that do not require particular qualifications is the presence of the group in generally in the workforce or market. *Croson*, 488 U.S. at 501; *Johnson*, 480 U.S. at 631-32, citing *Teamsters v. United States*, 431 U.S. 324 (1977) and *Steelworkers v. Weber*, 443 U.S. 193 (1979); *id.*, at 651 (O'Connor, J., concurring in the judgment); *Adarand*, 228 F.3d at 1173. Thus, in the absence of identified and measurable qualifications that can be applied to determine an accurate approximation of those minorities available in the market to participate in FCC licensing, the presence of minorities generally in the appropriate market is the proper standard.

Third, because licensing involves the ownership of businesses rather than employment, the appropriate measure of availability is not participation in the labor force, but rates of business ownership in the market. See *Croson*, 488 U.S. at 502 (citing *Ohio Contractors Assn. v. Keip*, 713 F. 2d 167, 171 (CA6 1983), for its "rel[iance] on percentage of minority *businesses* in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside" (emphasis in original)). See *Adarand*, 228 F.3d at 1173. Thus, in this circumstance, minority business ownership would be an appropriate measure of availability for licensing. See *Concrete Works*, 321 F.3d at 964-69.[15]

A comparison of recent data on minority ownership of FCC broadcast licenses to minority business ownership shows that minority businesses are underrepresented in FCC licensing. For example, in 2000, minorities owned 3.8% of all radio and television stations. By race and type of license, in 2000, African Americans owned 2.0%, Hispanic Americans owned 1.8%, Asian Americans owned 0.2% and Native Americans owned 0.0% of radio stations; and African Americans owned 1.7%, Hispanic Americans owned 0.1%, Asian Americans owned 0.2% and Native Americans owned 0.0% of television stations. See *Changes, Challenges, and Charting New Courses: Minority Commercial*

[15] A more refined analysis of relevant business participation rates might take account the characteristics of non-minority FCC license-holders and identify the rate at which minorities with those characteristics are available in the market, adjusting as well for the effects of discrimination in the broadcast and wireless industry that have depressed the rate at which minorities have had the opportunity to acquire the relevant characteristics.

Broadcast Ownership in the United States, The Minority Telecommunications Development Program, National Telecommunications and Information Administration, United States Department of Commerce (December 2000), at pp. 34, 36-37.[16]

In contrast, in 1997, minorities comprised 14.6% of all business enterprises, and African Americans owned 4.0%, Hispanic Americans owned 6.0%, Asian Americans owned 4.0% and Native Americans owned 0.9% of all firms.[17] Moreover, measured by Industry Divisions,[18] minorities owned 6% of transportation, communications and utilities firms, and African Americans owned 9.0%, Hispanic Americans owned 7.0%, Asian Americans owned 4.0% and Native Americans owned 3.0% of those firms. See *The State of Minority Business, 1997 Survey of Minority-Owned Business Enterprises, An Initial Analysis plus Policy and Research Implications*, U.S. Department of Commerce Minority Business Development Agency (2001), at pp. 2, 10. These data demonstrate statistical disparities[19] between minority broadcast licensing and minority business ownership, including ownership in the applicable Industry Division.[20]

In addition, it should be noted that, at the time the FCC adopted its minority ownership policies in 1978, racial minorities owned less than 1% of all commercial broadcast licenses, and current data, above, demonstrate that Asian Americans still own less than 1%, and Native Americans own no (0.0%) radio or television stations. These disparities

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[16] Further, minority radio stations compete in only 54 percent of the Nation's 210 Designated Market Areas ("DMAs," the local markets used for the measurement of television and radio audiences by the A.C. Nielsen Company and Arbitron media research firms), while full power minority television stations broadcast in only 10 percent of DMAs in the country. See *Id.*, at p. 6 n. 16, 36.

[17] Percentages of individual racial groups do not sum to total minority due to method of counting individual racial groups. For example, Hispanic Americans may also be counted as members of another racial group. *The State of Minority Business, 1997 Survey of Minority-Owned Business Enterprises, An Initial Analysis plus Policy and Research Implications*, U.S. Department of Commerce Minority Business Development Agency (2001), at p. 2.

[18] "Industry Divisions" are the primary level of related economic activities classified by the Census Bureau using the system published in the *Standard Industrial Classification (SIC) Manual*. See *Company Summary 1997 Economic Census Company Statistics Series 1997*, U.S. Department of Commerce Economics and Statistics Administration U.S. Census Bureau (2001), at p. 5.

[19] Minority license ownership was somewhat lower in 1997, the year corresponding to the minority business ownership data here, thus, the actual disparity is larger. The National Telecommunications and Information Administration's 1997-1998 survey of minority ownership of full power commercial radio and television stations in the United States found that minority commercial broadcast ownership was at 2.9%, as compared to the 3.8% in 2000. See *Minority Commercial Broadcast Ownership In The United States* United States Department Of Commerce National Telecommunications And Information Administration Minority Telecommunications Development Program, http://www.ntia.doc.gov/opadhome/minown98/.

[20] This comparison is not intended to substitute for an appropriate, professionally-prepared disparity study. Rather, it is presented to illustrate that an appropriate assessment of available data yields a disparity between minority business ownership and FCC license ownership. A professionally-prepared study would more precisely measure availability and utilization, resolve differences in definitions regarding data and, as discussed below, adjust current business ownership availability rates to account for discrimination that may have prevented minority business formation in broadcasting and telecommunications.

justified the 1978 minority ownership policies on remedial grounds despite the fact that the FCC premised their adoption on broadcast diversity grounds. Further, the fact that, currently, the ownership of FCC licenses among some minority groups is 0.0%, and that minority license ownership is 0.0% in nearly one-half of the radio markets and 90% of the television markets of the Nation, see n. 17, represent undeniably significant disparities that justify appropriate consideration of race. The complete absence of minority ownership among some groups and in a majority of markets—the inexorable zero—is itself significant. See *Johnson*, 480 U.S. at 653, 656-57 (O'Connor, J., concurring in judgment) quoting *Teamsters*, 431 U.S., at 342, n. 23 ("[Fine] tuning of the statistics could not have obscured the glaring absence of minority line drivers. . . . [The] company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'").

Of course, comparison of minority licenses to *existing* minority business participation, in general and in Industry Division, does not take into account the effects of discrimination on the rate at which minorities may have entered into relevant businesses. This is particularly important here, as broadcast and wireless businesses cannot exist apart from FCC licenses. Evidence that discrimination may have adversely affected minority business formation is a factor that heightens the significance of disparities in existing business utilization in drawing an inference of discrimination. *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1174 (10th Cir. 2000) ("Adarand VII"), cert. granted, 532 U.S. 941, cert. dismissed as improvidently granted, 534 U.S. 103 (2001). Here there is evidence suggesting that various forms of discrimination have posed substantial barriers to the formation of minority businesses in connection with FCC licensing, in areas such as employment, access to credit and capital, past licensing criteria, exclusion from networks providing access to information and transactions, and the like. This evidence would suggest that, but for discrimination, minority participation in licensing would be at higher rates and increases the significance of the disparity between rates of minority FCC licenses and business ownership.

In addition, evidence that current business formation rates have been adversely affected by discrimination provides the basis for further research to determine appropriate approximations of current minority business availability "but for" this discrimination. There are appropriate methodologies by which estimates of minority participation in areas of business are developed and serve as the basis for adjustments to existing availability rates to account for the effects of discrimination on business formation. See *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 979 (10th Cir). The FCC, therefore, should commission a study to determine appropriate measures of the rate of expected minority licenses in the absence of discrimination, that take into account the effects of discrimination on business formation in this area, as well as differences for AM, FM and television licenses, and appropriate geographic and other factors, see, e.g., note 17, to establish more accurate bases for measuring disparities, the effectiveness of measures and progress toward the remedial goals.

Nor do these statistical disparities exist in a vacuum. Evidence of discrimination, including evidence of patterns and practices of discrimination in licensing and in the

industry are presented in the Section 257 Studies. This evidence also serves to establish a firm basis that remedial action is needed, contributes to the suggestion of a prima facie case of discrimination justifying remedial consideration of race, and increases the significance of the statistical disparity between FCC licensing and minority business ownership. *Croson*, 488 U.S. at 509; *Johnson*, 480 U.S. at 631-32 & n. 11., citing *Teamsters v. United States,* 431 U.S. 324, 339 (1977); *Adarand*, 228 F.3d at 1173.

Given this basis in evidence, the FCC properly may consider race in determining licensing. The FCC may act even as it undertakes to determine more precisely its goals, that is, the appropriate measures of the rate of expected minority licenses in the absence of discrimination, taking into account discrimination in business formation and among various licenses and geographic areas, as discussed immediately above. Narrowly tailored consideration of race is appropriate even prior to the full development of such goals if it is consistent with a comparison of minority licenses, not simply to minorities in the labor force, but to the comparable pool of minorities available in the market. See *Johnson*, 480 U.S. at 654-55 (O'Connor, J., concurring in the judgment) ("At the time of the promotion at issue in this case, the short-term goals had not been fully developed. Nevertheless, the Agency had already recognized that the long-range goal was unrealistic, and had determined that the progress of the Agency should be judged by a comparison to the *qualified* women in the area work force. As I view the record, the promotion decision in this case was entirely consistent with the philosophy underlying the development of the short-term goals.") (emphasis in original).

In addition, the Section 257 Studies do provide relevant evidence regarding the FCC's licensing practices. Specifically, they demonstrate not just that FCC minority ownership measures thus far largely have been ineffective, but that these measures actually have served to *discriminate against* minority-controlled applications and in favor of majority-controlled licenses with only nominal minority participation, except for auctions with installment plans.

First, without elaboration or further analysis, the Utilization and Logistic Regression Licensing Studies point out that minority participation in applications for licensing, even during periods of minority ownership credits, is very low, and that the low level of minority applications contributes to the low level of licensing. The Capital Markets and Historical Studies provide evidence of discrimination and other barriers that explain at least some of the disparity in the rate of minority applications, in the inability of minorities to raise sufficient capital to apply and in employment and other discrimination within the industry that prevents minorities from obtaining the exposure, experience and access to transactions that lead to applications. This evidence suggests that there is a need for more potent and effective measures to encourage, promote and elicit minority applications for licenses, and deeper investigation of the reasons for the very low participation rate of minorities in applying for FCC licenses to sharpen and fine tune those measures. These may include both race-neutral and race-conscious measures.

Second, the Utilization and Econometric Studies establish that there is a significant disparity in minorities qualifying for licenses. The Studies did not identify or analyze

particular barriers to qualification, except for the assessment of discrimination against minorities in access to capital in the Capital Markets Study. These results suggest that both race-neutral and race-conscious measures are needed to eliminate barriers and promote non-discriminatory access to qualifying for FCC licenses. In addition, these results suggest the need for further inquiry to identify particular standards for qualification that represent barriers to minority applicants and the modification of those standards, to the extent possible, or the adoption of measures to assist minorities to overcome these barriers.

Third, and perhaps most significantly, the Utilization Study, Logistic Regression Study and Econometric Study demonstrate that qualified minority-controlled applications received licenses at significantly lower rates than non-minority-controlled applications, even in proceedings in which credit was purportedly awarded for minority ownership. Under the comparative hearing regime, the Utilization and Logistic Regression Studies demonstrate that minority applicants faced greater competition, and received licenses at significantly lower rates than non-minorities, in singleton applications, and that minority-controlled applicants received licenses at statistically significant lower rates than non-minority-controlled applicants in comparative hearings. Indeed, these Studies demonstrate that, controlling for important variables, credit for minority ownership was given for nominal minority participation in majority-controlled applications ("sham" transactions) but not for minority control of applications. Under the license auction regime, the Econometric Study demonstrated that qualified minority applicants received licenses at higher rates overall, but only by reason of their higher rate of success in auctions with installment plans as, in auctions without installment plans, they received licenses at statistically significant lower rates. These findings demonstrate that, in design or application, past FCC measures to promote minority ownership in the comparative hearing and auction processes, except for auctions with installment plans, were not only ineffective, but discriminated against minority-controlled applications, served to reduce the rates at which minorities received licenses and, in fact, promoted majority-controlled licensing by discriminating in favor of majority-controlled licenses with only nominal minority participation.

The results of analyses that control for important variables and find that qualified minority-controlled applications were treated less favorably than majority-controlled applications, even when advantage was to be afforded for minority ownership, suggests that discrimination in licensing is deeply ingrained and that the FCC has not eliminated it from its licensing processes. The persistence of discrimination against minority-controlled applications in the comparative hearing regime, particularly in the disparate application of minority credits in favor of majority-controlled applications with nominal minority participation and not for minority-controlled applications, suggests that discrimination has continued to effect the judgment of decisionmakers in that process. This suggestion is reinforced by the fact that minorities received licenses at statistically higher rates in auctions with installment plans—circumstances in which FCC decisionmaking apparently is removed from or reduced in the license award process.

The results of these licensing studies clearly suggest, first, that the FCC must engage in careful and critical self-assessment of its policies, practices, personnel and operations to identify any sources of bias and the means by which discrimination is or can be manifested. Second, corrective action should follow this assessment to address the identified manifestations and potential sources of, and opportunities for, discriminatory actions and decisions. Third, these results contribute substantially to the other evidence, discussed above, of a prima facie case of a pattern and practice of discrimination in the award of FCC licenses, providing a compelling interest for consideration of race in awarding licenses to remedy that discrimination. Forth, these results clearly suggest that, to the extent that auctions continue to be used to award licenses, the availability of installment plans in those auctions is absolutely critical to the opportunity for minority applicants to obtain licenses.

The Section 257 Capital Markets Study also provides important evidence with respect to the availability of race-conscious measures in licensing. That Study, consistent with other empirical studies suggesting racial discrimination in U. S. capital markets, found that, controlling for important variables in a variety of models, minority applicants for wireless licenses and broadcast licensees both were significantly less likely to be afforded debt financing and were charged significantly higher interest rates than non-minorities. The Study also suggests that discrimination in capital markets contributes to the significant racial disparity in minority qualification rates for wireless auctions and in winning license auctions. The Study also found significant reliance on debt financing by broadcast and wireless participants and that, controlling for a number of relevant variables, minority applicants were less likely to be afforded debt financing and were less likely to win auctions, both at levels of statistical significance. These findings suggest that discrimination not only exists in capital markets associated with the broadcast and wireless industry, but significantly denies and impedes minorities in the ability to qualify for and obtain FCC licenses. This evidence adds to the other substantial evidence of discrimination in the licensing process as a basis for remedial consideration of race, and suggests that race-conscious measures to enable minority applicants to secure financing are needed.

The Advertising Study similarly provides evidence suggesting discrimination in the broadcasting industry that affects the ability of minorities to acquire licenses and operate and expand broadcasting businesses. The Study found that minority-formatted and minority-owned radio stations earned less revenue per listener and lesser revenue, including even in comparison of minority- and majority-owned stations that targeted minority audiences. While the Study did not rule out other factors that might contribute to these disparities, and even suggested some of those factors, it also referred to documentary and anecdotal evidence of explicit racially discriminatory advertising practices. Thus, while further statistical inquiry might be appropriate to understand the extent to which advertising discrimination explains disparities in broadcasting revenue, the Study provides evidence from which an inference of discrimination in broadcast advertising can be drawn.

All of this evidence, regarding the FCC licensing process and industry participants, serves to establish a firm basis that discrimination limits the opportunities of minorities in licensing as a premise for the remedial consideration of race in FCC licensing, and indicates that the following types of measures are appropriate and necessary:

1. Programs providing outreach, recruitment, employment, and similar opportunities for minorities to obtain exposure and experience, and to stimulate interest in participating, in broadcasting.

2. Incentives for, and other measures to stimulate, minority applications for FCC licenses.

3. Programs providing minorities with assistance in qualifying for participation in license acquisition processes. Specifically, insofar as license auctions continue, provision for installment plans in connection with those auctions is clearly indicated. In addition, further investigation and analysis of other barriers to minority applicants qualifying for participation in licensing processes is needed, together with appropriate modification or provision of alternative means for minority qualification.

4. Assistance in access to financing and capital at race-neutral rates of interest for would-be minority applicants, minority applicants and minority licensees.

5. Consideration of the race of controlling ownership in applications for licenses, as one factor along with other relevant factors, in mechanisms for the acquisition of FCC licenses with the goal of eliminating disparities between minority license-holding and adjusted measures of minority business ownership in the market.

6. Measures to stimulate the transfer of licenses to minority owners in the secondary market, such as the tax credit program, toward the same goal of eliminating disparities between minority licenses and availability rates, given that most licenses already have been issued by the FCC and real progress in expanding ownership is only possible through transfer of licenses already held in the private market.

7. Further professionally-prepared research to determine more precisely appropriate levels of relevant minority business ownership in the market adjusted to determine levels of expected participation "but for" discrimination in licensing, in the broadcasting and wireless industry and in the capital markets, in order to establish flexible goals for minority participation by which progress can be measured and a point at which race-conscious measures can be terminated.

2. Diversity Interest

The Supreme Court's *Grutter* decision raises the question whether broadcast diversity would be recognized as a compelling interest. An analysis of the Court's treatment of relevant issues in *Metro Broadcasting* and *Grutter* suggests broadcast diversity is capable

of recognition as a compelling interest and that narrowly tailored consideration of broadcast diversity could satisfy strict scrutiny.

In *Metro Broadcasting*, the majority opinion grounded its decision that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective" on the basis of First Amendment interests. Referring to Justice Powell's opinion in *Regents of University of California v. Bakke, 438 U.S. 265, 311-313 (1978)* (opinion of Powell, J.), the Court held, "[j]ust as a "diverse student body" contributing to a "'robust exchange of ideas'" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Metro Broadcasting*, 497 U.S. at 568. The majority opinion also referred to the expression of First Amendment interests served by broadcast diversity on the part of the FCC, *id.*, at 556 quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F. C. C. 2d 979. 980-981 ("Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment."), and Congress, *id.*, at 575-76 quoting the legislative history of Section 115 of the Communications Amendments Act of 1982, H. R. Conf. Rep. No. 97-765, p. 40 (1982) ("Observing that the nexus between ownership and programming "has been repeatedly recognized by both the Commission and the courts," Congress explained that it sought "to promote the diversification of media ownership and consequent diversification of programming content," a principle that "is grounded in the First Amendment.").

First Amendment interests are particularly implicated in broadcasting due to the scarcity of the medium and the interests of the people in the government's administration of this public resource. Thus, the FCC has the authority to put restraints on broadcasters to serve the right of the people to free speech and "their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Id.*, at 566-67 quoting *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969). At the same time, of course, important First Amendment interests would be raised if the government were to inhibit or impose any particular message on broadcasters. *Id.*, at 585, n. 36.

The dissent in *Metro Broadcasting*, written by Justice O'Connor, squarely rejected the premise that "broadcast diversity" was a compelling interest: "The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Id.*, at 613 (O'Connor, J., dissenting). This conclusion bears closer scrutiny in light of the Courts' treatment of some of the same issues in the subsequent *Grutter* decision, however.

As to the First Amendment, the dissent in *Metro Broadcasting* acknowledged those interests relating to the regulation of broadcasting to encourage diversity of broadcast views, but questioned whether they were "important for equal protection purposes." At the same time, it acknowledged that the "[t]he FCC's extension of the asserted interest in diversity of views in these cases present[ed], at the very least, an unsettled First

Amendment issue." *Id.*, at 616. More specifically, the dissent stated that, "[a]lthough we have approved limited measures designed to increase information and views generally, the Court has never upheld a broadcasting measure *designed to amplify a distinct set of views or the views of a particular class of speakers*. *Id.*, at 616-17 (emphasis added). Thus, the dissent's concern was focused on its view of the FCC's policy as a measure to promote only particular views or the views of a particular group. To the extent that the measures to promote broadcast diversity encompass all racial groups as well as other relevant factors, this concern would be eliminated.

The dissent also found broadcast diversity inadequate for several reasons. "First, it too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination." *Id.*, at 613 quoting *Richmond v. J. A. Croson Co.*, 488 U.S. at 493. However, in *Grutter*, the Court squarely rejected the notion that remedying discrimination is the only compelling interest that would support consideration of race. Speaking for the Court and referring specifically to the quote from *Croson* relied on in her *Metro Broadcasting* dissent, in *Grutter*, Justice O'Connor explained:

> It is true that some language in [earlier] opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.... Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

Grutter, 539 U.S. at 328 quoting *Richmond v. J. A. Croson Co.*, 488 U.S. at 493 (internal quotations omitted).

"Second," the dissent in *Metro Broadcasting* argued that broadcast diversity was "an insubstantial interest, one that is certainly insufficiently weighty to justify tolerance of the Government's distinctions among citizens based on race and ethnicity [,] ... trivializes the constitutional command to guard against such discrimination and has loosed a potentially farreaching principle disturbingly at odds with our traditional equal protection doctrine." *Metro Broadcasting*, 539 U.S. at 613. More particularly, the dissent was concerned that broadcast diversity was "amorphous" and "might be used to justify ... unconstrained racial preferences" and the "indefinite use of racial classifications" against any group, including "those groups currently favored," in pursuit of "outright racial balancing." *Id.*, at 614. As well, the dissent in *Metro Broadcasting* criticized the majority's holding for permitting the FCC to "advance its asserted interest in viewpoint diversity by identifying what constitutes a "black viewpoint," an "Asian viewpoint," an "Arab viewpoint," and so on; determining which viewpoints are underrepresented; and then using that determination to mandate particular programming or to deny licenses to those deemed by virtue of their race or ethnicity less likely to present the favored views." Thus, consideration of race for broadcast diversity was seen to have no "legitimate" or "important" reason and, instead, made "generalizations impermissibly equating race with thoughts and behavior," with the result that "it will prove impossible to distinguish naked preferences for members of particular races from preferences for members of particular races because they possess certain valued views." *Id.*, at 615-16.

Justice O'Connor's majority opinion in *Grutter*, however, generally took a different view and reached a different outcome on these same issues. Where the *Metro Broadcasting* dissent found an "unsettled" constitutional question with respect to broadcast diversity, the compelling interest in student diversity was held to emanate from the First Amendment: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter*, 539 U.S. at 330. The judgment of admissions officers "to select those students who will contribute the most to the 'robust exchange of ideas'" seek to achieve a goal of "paramount importance" that lies "at the heart of the Law School's proper institutional mission," and good faith is to be presumed in the absence of contrary evidence. *Id.* As noted above, there is no dispute that the First Amendment is implicated in the role of the FCC and use of the spectrum.

In addition, contrary to the *Metro Broadcasting* dissent's characterization of broadcast diversity as an "amorphous" interest that "might be used to justify ... unconstrained racial preferences," the *Grutter* Court distinguished the Law School's efforts to enroll a "critical mass" of minority students from unlawful racial balancing on the basis that "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* Indeed, *Grutter* identified the "substantial" benefits of student diversity, as "promot[ing] cross-racial understanding, ... break[ing] down racial stereotypes, and enabl[ing] [students] to better understand persons of different races," with the result that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* (internal quotations and citations omitted). Further, the Court emphasized that "[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* Moreover, the Court found that "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity" recognizing the United States' assertion that "ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective," and concluding that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.*, at 331-32 (internal citations omitted).

Further, contrary to the concern expressed in the *Metro Broadcasting* dissent that consideration of race to achieve broadcast diversity made "generalizations impermissibly equating race with thoughts and behavior," the *Grutter* Court held, with respect to the interest in student diversity, that:

> The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such

> stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.

Id., at 333 (internal citation omitted).

The *Grutter* decision contributed significantly to the development of the concept of strict scrutiny in recognizing that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" and that "strict scrutiny must take relevant differences into account." *Id.*, at 327, quoting *Adarand*, 515 US, at 228 (internal quotations omitted). The reasoning by which the Court approved consideration of race in pursuit of diversity in *Grutter*, including with respect to the concerns raised in the *Metro Broadcasting* dissent, suggests that diversity in broadcasting, like diversity in college admissions, is a compelling interest. While *Grutter* pointed out that institutions of higher learning "occupy a special niche in our constitutional tradition," *id.*, at 330, our strong First Amendment guarantees of free speech and interests of the people in having access to richly varied voices and viewpoints, particularly through the finite medium of the electromagnetic spectrum, represents a critical national interest. Although for the most part not specifically designed as an educational undertaking, broadcasting is a vital public source of that "exposure to widely diverse people, cultures, ideas, and viewpoints" critical to our development and vitality as a society and to our participation in the world. As well, the "paramount government objective" of "ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities" is served by measures that make room for all voices in the publicly awarded and regulated opportunities to use the airwaves, and such measures are necessary to permit the "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation [that] is essential if the dream of one Nation, indivisible, is to be realized." *Id.*, at 331-32 (internal citations omitted).

Promoting diversity in broadcasting is an essential feature of the mission of the FCC, as defined by Congress and in the life and experience of the agency. Of course, in *Grutter*, a record was developed articulating the benefits of diversity in higher education, yet those benefits, elucidated in the *Grutter* opinion, are relatively obvious and universal. The experience of the FCC and congressional attention to broadcasting represent a record of the benefits and interests of broadcast diversity, as do other sources. In addition, the relationship between the ethnicity of owners and broadcast diversity is established in the Section 257 Content/Ownership Study, particularly for radio,. See Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?, at pp. i, 37-38.[21] In designing measures to promote broadcast diversity that considered race, it would be prudent for the

[21] The definition of diversity for purposes of the Study involved a number of elements of programming related to race or ethnicity, see Content/Ownership Study at p. 28, although differences also were reported as to matters of concern to women and senior citizens and in coverage of government meetings and current events. *Id.*, at p. 38.

FCC to catalogue the evidence of the benefits of diversity and identify those characteristics and other factors that contribute to diverse content and voices.

Of course recognition of broadcast diversity as a compelling interest satisfies only one of two prongs of strict scrutiny. Further consideration of the evidence supporting, and the design of, measures to achieve diversity are relevant to the second prong of strict scrutiny, narrow tailoring. The discussion of narrow tailoring suggests factors that must affect the circumstances and manner in which race appropriately might be considered in furtherance of diversity.

The FCC has adopted a number of policies and employed a number of mechanisms to further broadcast diversity in the public interest. See *Metro Broadcasting*, 497 U.S. at 584-90. Among these, it long considered a number of factors regarding station ownership in service of the interest in broadcast diversity. In the comparative hearing process, for example, it considered factors relating to ownership, identified in policy, that were understood to bear on the issue of broadcast diversity in deciding among applicants for licenses. The race of prospective owners was not among those factors until required by judicial rulings, and such a policy was not adopted until national attention was drawn to the fact that broadcasting outlets did not reflect the culture, thought, history or views of minorities. Thus, consideration of race in ownership came in response to a recognized deficit in the diversity of broadcast content and viewpoint. The data on minority licensing, particularly that regarding the complete absence of participation in a majority of the broadcast markets, would suggest that such a deficit continues.

Narrow tailoring considerations counsel that continued consideration of race in ownership would require an articulation of that goal and the means by which applicants could articulate the variety of ways in which they could contribute to program diversity. Race of ownership would be only one factor among many, including other relevant characteristics of owners, staffing and other factors affecting programming that would contribute to program diversity. Consideration would need to be given to of all of these factors, and in a manner that would allow individualized consideration of the relative contributions of each application. The concept of "critical mass" as described in *Grutter* may not be readily transferable to minority ownership in the broadcasting context, but evidence suggests that considerations of geographic and market participation may be appropriate.

Among the measures that would serve the interest in broadcast diversity are the following:

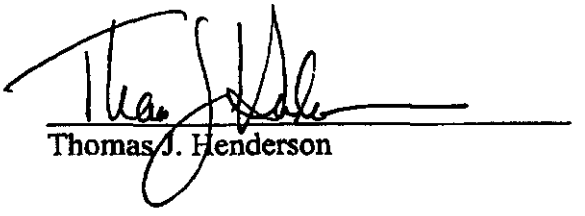
1. Development of a policy on broadcast diversity that identifies its various aspects, such as viewpoint, voice, intended audience, service to local community, etc.

2. Providing the means by which applicants could articulate any and all bases on which they would contribute to broadcast diversity.

3. Consideration of the race of ownership of applicants pursuant to a policy that afforded individualized consideration to each applicant and encompassed a variety of factors that would enhance broadcast diversity as a qualification for licensing.

VI. CONCLUSION

Evidence from the Section 257 Studies considered in light of the further development and application of the strict scrutiny standard in *Grutter* and appellate court decisions sustaining the constitutionality of federal and local measures to increase the participation of minorities in the life of the nation suggest that the FCC has compelling interests for the consideration of race in license ownership and the means to provide narrowly tailored consideration of race in furtherance of those compelling interests. The most substantial impediment to implementation of such measures may be the historical reluctance of the FCC squarely and thoroughly to address the legacy of the exclusion of minorities from the broadcast and wireless industry.



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